

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

TRICONT TRUCKING COMPANY

and

**TEAMSTERS LOCAL UNION NO. 107, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**Case Nos. 4-CA-37628
4-CA-37694
4-CA-37719
4-CA-37795
4-CA-37879
4-CA-37893
4-CA-37907
4-CA-37908**

Donna Brown, Esq., Counsel for the General Counsel.
Thomas Kohn, Esq., *Markowitz & Richman*, Counsel for the Charging Party.
Thomas Bender, Esq. and *Nina Markey, Esq.*, *Littler, Mendelson, P.C.*, Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on March 8, 9, 10, 11 and 14, 2011. The Amended Consolidated Complaint herein, which issued on February 28, 2011, was based upon charges and amended charges that were filed by Teamsters Local Union No. 107, a/w International Brotherhood of Teamsters, herein called the Union, from August 17, 2010¹ to January 7, 2011. The Amended Complaint alleges numerous Section 8(a)(1) violations by Tricont Trucking Company, herein called the Respondent, by a number of alleged supervisors and agents of the Respondent. It is alleged that Michael Procak, alleged to be the General Manager of the Eddystone facility, and admitted to be a supervisor within the meaning of the Act, threatened employees with discharge due to their Union activity, interrogated employees about their Union activity, threatened an employee with bodily harm because of his support for the Union, and created the impression that the employees' Union activities were under surveillance by the Respondent, as well as committing other Section 8(a)(1) violations.

It is alleged that Robert Branyan, alleged to be dispatcher/lead driver and a supervisor and agent of the Respondent (denied by the Respondent) also engaged in numerous violations of Section 8(a)(1) of the Act, including threatening employees that their working conditions would change, and that their work would be closely watched, because they voted for the Union. It is also alleged that Dave Luka, warehouse manager, and an admitted supervisor, threatened an employee with fewer work days to give the employees time to think about the Union and the Board election. It is further alleged that Respondent, by Jesse Krise, the Northeast Regional Manager, and an admitted supervisor and agent of the Respondent, told an employee that the Respondent knew who the Union supporters at the facility were and asked the employee to name others, created the impression that the employees' Union activities were under surveillance, told an employee that the Union could not assist him, told an employee to quit

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2010.

because he supported the Union, and threatened an employee in retaliation for an unfair labor practice charge that he filed against the Respondent. It is also alleged that he denied employee John West’s request for a Union representative to be present at an investigatory interview, and then issued him a verbal warning.

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It is further alleged that the Respondent engaged in the following conduct:

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(a) In about July or August, for a two week period, reduced the workdays of employee Enrique Massa-Torres from six to five days a week;

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(b) On about August 11, demanded that Torres pay for a parking ticket that he received, issued a final warning to him, and then suspended him;

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(c) Since about August 17 has more strictly enforced Department of Transportation (DOT) rules concerning driving hours;

(d) On about August 17 discharged Torres, and on about September 29, suspended employee Bill Ditzler as part of its more strict enforcement of these rules, and on about October 10, gave Ditzler a suspension and final warning;

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(e) In late October or early November, issued a verbal warning to employee Henry Cajina, on about December 14, issued a verbal warning to West, and on about January 6, 2011, discharged Ditzler and Cajina as part of its more strict enforcement of the DOT rules.

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(f) Beginning in July, assigned less work to Torres, West and Barry Lewis.

(g) On about October 15, instituted a policy under which drivers were no longer allowed to work on their scheduled days off, thereby reducing the unit drivers’ work hours, and on about November 3 and 4, refused Ditzler’s request to be assigned additional work.

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The Complaint alleges that the Respondent engaged in this activity because of the employees’ support for the Union, because it believed that Ditzler was giving testimony to, or cooperating with the Board in its investigation of the Union’s charges, and without prior notice to, or bargaining with, the Union, in violation of Section 8(a)(1)(3)(4)&(5) of the Act.

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The final allegation is that on about November 17, during bargaining, the Respondent claimed that there was less work to assign to the unit employees because of a drop in sales and business; on about November 18, the Union, by letter, requested that Respondent furnish it with records from the prior twenty four months detailing the drop in business, but the Respondent has failed and refused to provide the Union with this requested information, in violation of Section 8(a)(1)(5) of the Act.

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I. Jurisdiction and Labor Organization Status

The Respondent admits, and I find, that the it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

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II. Background

5 The employees involved herein are the truck drivers employed by the Respondent at its facility in Eddystone, Pennsylvania. At an election conducted by the Board on August 6, ten drivers voted for the Union and nine voted against the Union, and on August 17 the Union was certified as their bargaining representative. The Respondent is a wholly owned subsidiary of Del Monte Fresh Produce Co., herein called Del Monte, and the Respondent's drivers pick up and deliver this produce throughout the area, north to New York, west through Pennsylvania, and south to parts of Maryland. An important aspect of this case involves the logs maintained by the drivers and mandated by the United States Department of Transportation, herein called the DOT. All drivers are required to maintain a daily log showing the amount of time (and the actual time) that the driver spent driving, on duty but not driving, off duty, and the total miles driven on that day, and for that week. The daily log is used to prevent drivers from driving, or working, for longer periods than are permitted by DOT rules in order to prevent driver fatigue. In addition to the daily DOT logs, each driver is required to complete a Daily Trip Sheet, mandated by the Respondent, which lists all stops the drivers made as well as the mileage between the stops. Some of the drivers admitted falsifying some of their logs, but testified that they did so at the request of supervision, so that they could complete their deliveries, and that prior to the Union election, this was an accepted practice. Respondent's witnesses denied asking or telling employees to falsify their logs or knowing that the drivers were falsifying their logs, and only learned that some of the drivers were falsifying their logs after the initial unfair labor practice charge was filed by the Union. Counsel for the General Counsel, basically, alleges (in the Section 8(a)(1)(3)(4) allegations herein) that prior to the employees' Union activity, the Respondent instigated and/or encouraged the employees to falsify their DOT logs so that they could complete their deliveries for the day and it was only after the Union won the election that the Respondent issued warnings to, and terminated employees, for falsifying their logs.

III. The Facts

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A. Branyan's Supervisory Status

The Complaint alleges that Branyan was the Dispatcher/Lead Driver for the Respondent at the facility and a supervisor within the meaning of the Act. Respondent defends that he was the lead driver, but not a dispatcher and not a supervisor within the meaning of the Act, and there was a substantial amount of testimony from the drivers and from Branyan regarding his status. There is no question that when the drivers are on the road, and run into a problem, whether it is with a customer or their truck, the first person that they call is Branyan. There is a question, however, of whether he possesses, or exercises, any supervisory powers.

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Branyan began working for the Respondent in 2002 as a driver. He was included in the bargaining unit and voted in the election. Michael Nugent, business agent and organizer for the Union, testified that the Union did not "challenge" Branyan's inclusion in the unit because he felt that it would delay the election and he was confident that the Union could win the election even with him included in the unit. Branyan testified that at the present time he drives only when a route is not covered by one of the other drivers: "It could be once a week, it could not be for a couple of weeks. It depends on the situation, and on the staffing." On average, he drives four or five days a month and, when he does drive, it is usually only to one stop, maybe for one to three hours. He testified that driving takes up a little more than five percent of his time. He shares an office in the warehouse with Luka and Gus Rojas, the repack manager. He interviews applicants for jobs as drivers. When asked if he had ever hired anybody, he testified: "No, I'm part of the process, but I don't do the actual hiring." After interviewing an applicant, he sends the

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application to Krise, and might tell Krise about his opinion of the applicant. He takes driver-applicants on a road test and notifies Krise of how the applicant performed. As to whether he makes a specific recommendation that an individual should not be hired after this road test, he testified: "If I felt safety was involved, yes." He was then asked if they had acted on his
 5 recommendation, and he answered yes. He further testified that he effectively recommended that people be hired. When employees come to him requesting to take time off, he checks to see if others drivers had requested that time off, and if there was no conflict, he would tell the driver that he could take the time off. If there was a conflict, he would leave the decision to
 10 Krise. In December 2008 he signed an Absence Report for Torres as the "Supervisor/Manager" giving him two days funeral leave. He cannot discipline employees on his own, but "...if a situation arose where a driver was repeatedly late or something, in that situation I would just forward my findings." There was testimony about a former driver named Dave Weir. Branyan testified that Weir refused routes and stops that he was supposed to make. He did not discipline or recommend that Weir be disciplined, nor did he speak to him. Rather, he "forwarded the
 15 situation to Aaron Halcomb," Respondent's then Regional Manager, and asked him to speak to Weir. Ditzler testified that in about 2008, he observed that Branyan looked agitated and asked him what the problem was, and Branyan told him that "he had it with Dave Weir" and he was going to "suggest" that he be written up and fired, and Weir was fired. West testified that while he was training a new driver, the driver became excited and upset about a parking ticket. Later,
 20 while West was discussing the driver with Branyan, he told West that they were having problems with the driver, "and if he keeps on doing it, I'm going to have to fire him." Gregory Baylor worked for the Respondent as a driver from January 2008 to January 2011; he was interviewed only by Branyan, filled out the employment application, and eventually was told by Branyan that he was hired. Counsel for the General Counsel introduced into evidence thirteen
 25 Disciplinary Notices to employees from August 2007 to June 2010; Branyan signed them as "Supervisor/Manager." He testified that his sole responsibility with these Notices is to present them to the drivers and ask them to review and sign them.

When he arrives in the morning, he reviews the driver's assignments for the day and the
 30 driver's trip sheets from the prior day, looking for any missing information. He and Luka jointly prepare the drivers' weekly schedules. Procak testified that Luka knows the products and customers better than anybody else at the facility, and he will "slot" the trucks to the delivery. Then, he and Branyan will jointly select the drivers best qualified for each truck; if they are short a driver, Branyan will call other drivers to see if they are available. If he cannot find an available
 35 driver, either he or Luca will call an outside carrier to do the run. In about 2007 the Respondent purchased new uniforms for the drivers and Branyan was given the choice of wearing street clothes or the uniform, and he chose to wear the driver's uniform; no other driver was given that choice.

40 **B. Maintaining the Daily Logs**

The DOT requires drivers to maintain logs detailing how they spent their work day. These logs must be completed daily and has four categories to be filled in for the period
 45 midnight through midnight: 1. Off Duty; 2. Sleeper Berth; 3. Driving; and 4. On Duty (not driving). The driver must fill in the number of hours spent in each of these categories, as well as the number of hours worked over the prior seven days. On these logs, the driver draws a line from Off Duty, when he begins working, to either Driving or On Duty (not driving) and continues to record his work day in that fashion until the end of the work day when he draws a line back up to Off Duty. In addition, on the form, but under the "graph" setting forth the hours, the driver lists
 50 the stops that he made that day. In addition to this DOT Log, each driver maintains a Daily Driver Trip Sheet mandated by the Respondent. In addition to the miles driven and the hours worked that day by the driver, it includes the name and location of the customer, the time of the

5 delivery and the mileage between each delivery. Branyan checks, and initials these Daily Driver Trip Sheets. The DOT rules provide for a maximum of seventy hours a week (seven days) and fourteen hours a day of work time, but only eleven hours driving time, and permits one sixteen hour day with bad weather or traffic conditions. In addition, under the DOT rules, after working a
 5 seventy hour week, a driver must be off work for a thirty four hour "reset" period before he can start another work week.

10 A major portion of the testimony herein related to the logs maintained by the drivers. Some drivers testified that falsification of the logs was a regular occurrence, approved and encouraged by, the Respondent, generally, Branyan. Other drivers and Respondent's witnesses denied knowledge of the falsification of these logs.

15 Torres normally worked a Brooklyn-Queens route for about the last two years of his employment with the Respondent. He testified that on that route it was difficult to stay in compliance with the DOT regulations and he violated these regulations once or twice a week. When he began working for the Respondent he did not falsify his logs, but later Branyan showed him how to change the log so that it would not violate the DOT rules. Branyan made changes on the original log and told Torres to redo the log, which he did, and he submitted the corrected log. At other times, Branyan made the changes on the log. The changes were usually
 20 made to show that he returned to the facility earlier than he actually returned, which meant that he had worked fewer hours and could start earlier the next day. Torres and Branyan also made changes on his Daily Trip Sheets so that it would correlate with the logs and would not violate the DOT rules. Branyan has also instructed him to change his log when the mileage and the time showed that he was speeding:

25 He would do the calculation himself, he would have told me...it shows that you were speeding, that you were going 60 miles an hour...you can't change the driving time, we got to change the mileage. We got to put less mileage, that you did less mileage. Change it on the daily log but don't change it on the Tricont sheet because the Tricont
 30 sheet is how you get paid.

35 If the log indicated that the driver was speeding, both the driver and the company could get in trouble. Torres identified his log for March 18; it shows that he was driving that day for three and three quarter hours, and the mileage listed was 252 miles, but was changed to 202. He testified that Branyan told him that the log showed that he was speeding and would come back as a violation and changed the five to a zero so that it stated 202 miles and would not show that he was speeding that day. Similar changes were made for the total miles on his logs for March 25, March 27, April 2, April 13, April 16, and July 8², all, allegedly changed by Branyan, according to Torres' testimony. Branyan testified that the Respondent's RAIR system kicked Torres' March
 40 18 log back to Branyan showing that he was speeding. Branyan showed Torres the log and asked him "...to look it over and make any corrections with the miles...mileage if need be." Branyan did not change it and did not tell Torres to falsify or fix it, "No, just correct it." As with the change in the number of miles driven by Torres as set forth above, when Branyan received a log back from RAIR, he asked Torres to look over the miles and to correct it if it needed
 45 correcting.

Torres further testified to a situation in about June 2009 when he was sent to Kennedy

50 ² The Daily Trip Sheet for July 8 shows that his total mileage for the day was 250 miles (the ending odometer less the beginning odometer), while the total miles on the DOT log was clearly changed from 250 to 200.

Airport for a cherry pickup after going on his regular route. The paperwork at the airport was delayed and he had to wait and he contacted Branyan and Procak and they told him not to leave until he got the cherries from U.S. Customs. He returned late to the facility and saw that he was scheduled for an early route the following morning, that did not give him the required ten hours between shifts. When he told Branyan of the problem, Branyan said that he didn't have anybody else for the route, and he worked the next day without the required break.

West has been employed by the Respondent as a driver since February. He testified to a conversation that he had with Krise in August after Torres was fired. Krise told him that Torres returned from a trip at about 5:00 and logged that he returned at about 2:00. Krise said that was a log violation, a violation of Federal law, and they fired him. West replied that it was "funny that all of a sudden" they would fire him for a log violation and how could he have worked two or three years without violating the logs. He told Krise that Branyan had asked him to cheat on his log several times. He told him of an incident on March 17 when he had a North Jersey run and he was running out of hours and called Branyan to tell him that he would not be able to return within the required number of hours and Branyan kept telling him to keep going and calling him. When West called to say that he would not be back in time and would probably need a hotel, Branyan said, "We don't do hotels at Tricont, you bring the truck back and we'll figure it out, we might have to shave some hours off the beginning of your day, but we'll figure it out."³ Krise said that he knew nothing about falsifying the logs, and West said that it was "kind of impossible" that he didn't know because he is the one who is supposed to check the logs: "You are the one that's held accountable," but Krise repeated that he knew nothing of that. West then asked Krise to reinstate Torres and then hold a meeting of the drivers, tell them that he didn't know anything about falsifying logs, "but from this day on it stops." He said, "That could fix the problem right there."

West testified: "It's my job to make sure that the logs are right and it's also my supervisor and Jesse Krise, when they check the logs, to assure too that they are done properly;" when he began his employment with the Respondent he was not falsifying his log. The first time he did so was the North Jersey run referred to above. On that day, when he returned, Branyan showed him how to shave some time off his log by changing his time, although he is not certain whether they changed the start or the end time. On April 5 he called Branyan and told him that he was running late on his deliveries, and Branyan told him, "Don't worry about it, come on back and we'll fix the log when you get back." He testified to another situation, this one on April 9, where he had a tire blowout and was running late as a result. When he called Branyan to tell him that he was behind, Branyan told him not to worry, when he returned he could fix the log and shave time off either the beginning or the end of the run to reduce his hours to fourteen, which West did. Similarly, on May 11, when he called Branyan to tell him that he would not be able to return in time, Branyan told him that when he returned, he could fix the log by shaving time off the beginning or the end of the day. On May 25, West slipped off his truck and was running late as well. He called Branyan and told him that he didn't believe that he would have time to make his final stop that day, and Branyan told him that he had to make the stop and "when you get back we'll fix your log." When he returned, Branyan had him drug and alcohol tested, because of his fall, and then sat with him while he fixed his log. Branyan testified that on this May 25 incident, West told him that he had one stop left and he told West to come back and to forget the stop. West testified that Branyan instructed him to change his logs on eight or nine occasions. Subsequently, he changed his logs on several occasions without Branyan asking him to do so. On these occasions, while changing his log, he also had to change his Daily Trip Sheet for the day so that it correlated with the log.

³ Branyan testified that he never told West to shave time off his log.

5 Peter Faunce, who has been employed as a driver by the Respondent for four years, testified that Branyan has instructed him to correct his logs when there were mistakes in the logs, meaning that he had miscalculated his hours or made a similar error. He also testified that there were times when he was running late either from traffic, or a delay with a customer, and he would use the "regulations" to shave an hour or so off of his time if he ran into traffic. In about August, he was called in to speak to Krise and Procak, who showed him that his EZ Pass records establishes that he was about one hour over for a week about three months earlier. He told them that he was either off by an hour or had miscalculated, and Procak said, "I don't want to see that anymore." On redirect, he testified that there were occasions when he was running late and called Branyan, who told him that they needed the deliveries to be made and, when he returned, "I would shave the hours off." It was done at Branyan's suggestion, and in his presence. Branyan testified that he never told Faunce that they could shave hours off his log; he did tell him of the two hour exception for traffic or weather to extend the fourteen hours to 15 sixteen.

20 Gregory Baylor, who was employed by the Respondent as a driver for three years beginning in 2008, testified that "on occasion" he falsified his logs while employed there. On one occasion, he was running late and called Branyan to tell him so. Branyan told him to come back to the facility, and they would straighten it out when he returned:

25 When I got back because I was nervous about the whole situation because I never experienced it. I usually get back in time, where I wouldn't have to be in that situation. But when I came back and I was late he would sit down and he would go through the log and he would tell me to change certain things. And that's what happened.

He testified that this occurred on about four occasions. Branyan testified that he never told Baylor that if he was low on hours, that they could "straighten it out."

30 Luis DeJesus has been employed by Respondent as a driver since May. He testified that Branyan has instructed him to change his log on three or four occasions (although he did not specifically testify about the situations) and that Krise asked him to do so on one occasion, on July 15. He had an accident on that day and called Branyan to tell him that he was running late, and Branyan told him to call Krise. When he called Krise, DeJesus told him that he thought he could get back in time, but he didn't, he was a half hour late, for a total of sixteen and a half 35 hours. He was nervous about it and asked Krise if his job was in jeopardy, and Krise told him that it was no problem, everybody is given a second chance, and, "Do your log and put in 16 hours." And that is what he did. About a month or two later Procak asked him if Branyan ever asked him to falsify his log and, as he was scared, he answered no.

40 Larry Allen is employed by Trusted Transportation and was assigned to work at the Respondent from December 2009 to June as a temp driver. He testified that in December 2009 or January, he had two or three loads to pick up at the port. When he got there for the last load, it was not ready and he had to wait. With two hours left, he called Branyan and told him that he 45 had two hours of legal driving time left, and asked what he should do; Branyan responded that he would call Procak to "see if he wants you to sit on it or come back." About five minutes later, Branyan called him back and said that he should stay and wait for the load. Allen asked, "What about my hours?" and Branyan said, "We'll, just make it look legal and add whatever time you go over to tomorrow and you'll get paid for it," and that's what he did. Branyan told him to 50 change his log in that manner on about six to eight occasions, and he never did it without Branyan's direction.

5 Cajina, who was employed by the Respondent as a driver from January to January 6, 2011, testified to a situation where Branyan instructed him how to change his log. It involved his log for September 9 and, although his testimony on this subject is too confused to recite, what is clear is that Branyan placed some Xs on his log to show Cajina how he wanted the log
10 changed, and Cajina changed it as he requested. In October Branyan called Cajina and asked him to make an unscheduled stop in New Jersey, and Cajina told him that he didn't think that he had enough time left for the stop, although it is not clear from his testimony whether he made the additional stop. About two days later Branyan went over his log with him for that prior day asking him about every item in the log and asked him if they were correct, but Cajina did not
15 change anything on the log. Two days later, Branyan gave him a "violation" based upon that log, but he refused to sign it, and Branyan told him to see Krise. He went to Krise's office and Krise handed him a piece of paper and said, "Sign this. This is a violation." Cajina refused to sign and Krise said, "Why not, you violated the rules." Cajina again refused to sign and asked if it was a disciplinary action and Krise asked, "What are you going to do?" Cajina said, "I need to speak to my shop steward" and Krise said, "What the fuck is Barry going to do for you?" Cajina started to leave the office and Krise said, "You've dug your own grave." As he left, Krise told him, "This is a verbal warning." Krise testified that, at no time during this meeting, did Cajina ask for a Union steward, and he never said, "What the fuck is Barry going to do for you?" or that Cajina was digging his own grave.

20 Ditzler was employed by the Respondent as a driver from March 2007 to January 6, 2011. He testified that in August, after Torres was fired, he and Bob Wilbur were talking to Branyan who told them that Torres was fired for falsifying his logs. Ditzler asked him: "How can you fire somebody over something you guys want us to do? That's basically how we've been
25 trained." Branyan responded, "Well, things have changed. With the Union vote things have changed...and Mike is watching everything that we do." He testified that after he had been employed for a short time by the Respondent, he had been out for eighteen hours and when he gave Branyan his log, Branyan told him, "You can't put that in. You've got to shave some hours off." Branyan showed him how to alter his log by shaving hours off working time and/or driving
30 time. Branyan testified that he never told Ditzler that he could shave hours off of his time. Ditzler also testified that when he told Branyan that he had shaved time off of his run so that he could drive to Jessup, Maryland, Branyan told him to see Procak who would reimburse him for the lost time. In August 2010, he and Wilbur went into Branyan's office with Wilbur's log for the prior day. Branyan looked at the log and told him, "You can't hand that in. You've got to correct it."
35 Wilbur worked on it and handed it back to Branyan who said that it was still not right. Wilbur corrected it again, and Branyan took it from him. Branyan testified that the situation with Wilbur was that Wilbur had forgotten to complete his log by filling in the total hours on the grid, on the side of the log, and that is why he returned the log to Wilbur for corrections.

40 Ditzler testified about a situation on December 30 when he was at the Gloucester Port waiting for a load that was delayed for several hours. When he realized that he would be delayed he called Branyan and told him of the delay and left the port without all of the pallets. When he turned in his log to Branyan he told him: "I'm over" and Branyan told him, "Okay, just mark the box." Ditzler told him that he was also over hours two days earlier⁴, and Branyan said
45 that they would look over his log. After looking over the log, Branyan told him, "You've got to turn it in, but do me a favor. Shave the post trip off and it won't look as bad at 14.25 instead of 14.75." So he removed the thirty minute post trip from the log. He testified as well to a trip that he had in the Winter of 2010. He was leaving the port and called Branyan and told him that it was snowing and he was supposed to go to Jessup, Maryland, and asked what he wanted him
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⁴ He meant that he didn't have the required 34 hours for reset.

to do. Branyan told him that he was told that it wasn't snowing in Jessup and that he should make the trip. Shortly thereafter, it began snowing and he did not return until eighteen hours after he left. When he returned and handed in his log with eighteen hours, Branyan told him that he couldn't do that, that he should "shave whatever I had to bring it to 16," which he did.

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Lewis was employed by the Respondent as a driver for one year until March 2011. He testified that he began falsifying his logs about a month after he began his employment with the Respondent. On April 13 he had to wait a few hours at the port for a pickup and he called Branyan and told him of the delay. He handed in his log showing 6.15 hours driving and 10.45 hours on duty, not driving. Shortly thereafter, Branyan returned the log to him with an "X" at the top and a box at 5 P.M. to 6 P.M. with the word: "Remove." Branyan asked him to make these changes, which he did. He testified that during the period of his employment with the Respondent, Branyan instructed him to falsify his log on four or five occasions. On September 7 he worked sixteen hours and his log states that he had ten hours driving and six hours on duty, not driving. On the following day, he called Branyan from a rest stop on the New Jersey Turnpike to say that he was running out of hours and two and a half hours later, Branyan and another driver picked him up and drove him back to Eddystone, returning at about 10:30 P.M. His log for that day states 8.30 hours driving and 9.15 hours on duty not driving.

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Respondent defends that it was unaware that drivers were falsifying their logs until the investigation of the unfair labor practice charge involving the termination of Torres. Procak testified that prior to this Board investigation, he had no knowledge that Respondent's drivers were falsifying their logs and prior to this hearing had never heard the term "shaving time." He testified that as a result of the allegations contained in the Board's investigation, Jim Gulick, Vice President of Logistics for Del Monte, ordered an investigation of Torres' logs as compared to the EZ Pass records. He also requested that counsel talk to other drivers to learn whether others were falsifying their logs.⁵ Gulick also directed a wider investigation by comparing all drivers' log with their EZ Pass records going back to April 1 to determine whether there was any falsification of the logs. This summary was to be performed by a paralegal employed by counsel for the Respondent. Branyan testified that he reviews the drivers' trip sheets to be sure that they are complete, as the drivers are paid from them. If a driver forgot to include the total number of hours worked, Branyan will add the hours and put the total on the trip sheet and forwards them to Krise, who sends them to Procak. Branyan also reviews the drivers' logs but not as thoroughly as the trip sheets. With the logs, he puts them in order by date and "glances" over them for missing information, such as dates, mileage and the drivers' ID. He does not check the additions or subtractions because RAIR, the computer operation, calculates that. He makes copies of the logs, and scans it into RAIR. If RAIR finds any discrepancies, or problems, such as calculations or hours worked it forwards them to the Respondent's safety department in Coral Gables, Florida. They then prepare a spread sheet of any problems with the logs and send them to each of its facilities. Branyan looks over this information, compares it with the logs and discusses driving violations with Krise, who makes the decision whether the drivers should be disciplined for the violations. In some situations, Branyan first discusses the findings with the drivers. He testified that other than mathematical corrections, he does not make corrections on the logs, the drivers do that, and prior to the situations involving Torres and Ditzler, he was not aware that drivers were falsifying their logs. The practice is, if drivers notify him that they are running late, he can tell them to return and have somebody else do the missed stops. He testified that he never asked a driver to correct his log to show less work or driving time and, prior to the hearing, had never heard the term: "Shave time."

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⁵ Counsel met with eight or ten drivers, all of whom denied that they falsified their logs.

Krise testified that he does not review the logs when they are initially turned in; rather he reviews the daily report that is issued by RAIR. At that time, the only corrections that a driver could make to the log is arithmetic mistakes. Gulick testified that RAIR reports form and manner violations as well as hours of service violations, which are punished by progressive discipline, based on severity. During orientation, drivers are taught how to properly complete their logs and are supervised to see how they performed. In addition, Respondent conducts quarterly safety meetings with the drivers and posts monthly flyers at the facility on the subject. The Respondent can be fined or lose its operating authority if logs are not maintained properly and the drivers can also be fined, as well as incur discipline from the Respondent. He testified that prior to the investigation of the unfair labor practice charge regarding the termination of Torres, he was not aware that Respondent's drivers were shaving time off their logs and is not aware that any supervisor told employees to shave time from their logs. Gulick testified to three terminations by the Respondent, all at different facilities, that he was involved in. A driver in Phoenix was terminated on February 18, 2008 for failure to follow DOT regulations, a driver in Portland, Oregon was terminated on February 24 for failure to follow DOT regulations during his first ninety days of employment, and a driver in Plant City, Florida was terminated on September 29, 2009 for falsifying his health history on his DOT Medical Examination Report.

Respondent also called drivers to testify about falsification of their logs. Ronald Taylor has been employed by the Respondent as a driver for five years. He testified that he has never falsified his log and nobody from the Respondent ever encouraged him to do so. There have been occasions when he made a mistake on his log, such as writing seven hours when it was actually seven hours and fifteen minutes, and after Branyan pointed out the error to him, he, Taylor, made the correction. On two or three occasions, when he was nearing his maximum hours, he was instructed to bring his truck back. He has never been told to keep driving and finish his route when he was approaching his hours limit. Bob Pflugh, who has been employed by the Respondent as a driver for ten years, testified that he never falsified his log and has never been asked to falsify his log. He has made some minor mistakes on his log and Branyan asked him to correct them. On many occasions, he has been told to return to the facility because he was nearing the DOT limits on hours; he has never been told to keep driving in that situation. Robert Sauler, has been employed by the Respondent as a driver for four years. He testified that when he began working for the Respondent, Branyan told him to fill out a "straight log" and not to deviate from a straight log. He falsified his log on one occasion, in about the summer of 2009. He was spoken to about it in late 2010, and was told that it was caught by an EZ Pass time stamp on the trip and he admitted that he had falsified his log on that one occasion. On occasion, when he made a "mistake" on his log, such as an arithmetic mistake or drawing the line incorrectly, Branyan asked him to correct it. When he called in when he was close to working the maximum number of hours, Branyan has never told him to keep driving. Nobody has ever encouraged him to falsify his log and he has never seen other drivers do it, but "I'm aware of conversations, but not watching a driver falsify a log."

Darryl Cole has been employed by the Respondent as a driver for in excess of three years. He testified that he has made mistakes on his log such as adding up the hours incorrectly and on those occasions Branyan asked him to correct them, which he did. He has never been told to falsify his log and does not know if other drivers do so. Prior to the preparation for this hearing, he had never heard the term "shaving hours."

Michelle Kass, who is employed as a paralegal by counsel for the Respondent, was asked to perform an "audit" of several of the Respondent's drivers at the facility by comparing their logs with the EZ Pass records for their trucks in order to determine when, and if, the EZ Pass records establish that they went through an EZ Pass toll after their log states that they had returned to the facility and were off duty in order to determine whether there were discrepancies

between the drivers' logs and EZ Pass records.

C. The Union Organizing Campaign

5 The Union campaign began in about June. Lewis testified that he was the leading Union
organizer during the Union campaign. He and Torres obtained signed Union authorization cards
from the other drivers, and he, Lewis, was the Union's observer at the election and was
appointed as the Union's shop steward. Procak testified that during the Union campaign in
10 about July, he handed out literature to the drivers "on a personal one-on-one basis" and spoke
to the employees as well. One letter, dated July 19, says that he was told that the Union
promised the employees \$28 an hour, but that was an "empty promise." The letter goes on to
say that in collective bargaining, working conditions could get better, get worse or stay the same
and that in negotiations, Respondent would demand a management rights clause. He also
15 testified that he was told that Lewis was "behind" the Union campaign. Gulick testified that he
learned that West and Lewis were involved in the Union's organizing campaign.

D. Section 8(a)(1) Allegations

20 There are numerous Section 8(a)(1) allegations contained in the Consolidated Complaint
allegedly committed by Procak, Branyan, Krise and Luka. Torres testified that in about July, he,
West, Cajina and another driver were talking about the Union in the parking lot and Procak
approached them and said that the company would not give them anything in negotiations and
although the Union was talking about a pay raise, "the company wasn't going to offer us
25 nothing." Torres asked what if the Union asked for \$28 an hour, what would the company offer?
Procak replied, "Nothing. We're not going to negotiate with you guys. Nothing." Procak testified
that after Torres said that the Union was going to ask for \$28 an hour, he told the employees,
"The Union can promise you anything, but it will come down to collective bargaining where you
may end up with more, less or the same as you now have. There are no guarantees."

30 West testified that on about August 4, Procak approached him, gave him a flyer about
the election, and told him, "When this election is over, whether you win or lose, I'm going to
clean house no matter which way it goes." West replied, "What if I vote no?" and Procak
responded, "Well, I'm still going to clean house." West repeated, "Even if I vote no?" and Procak
answered, "Yeah, I'm still going to get rid of you." Procak testified that he never made those
35 statements to West and never threatened to discharge or discipline employees because of the
Union. He did tell them that under a management rights clause the company retained the right
to hire and fire as it saw fit and that might "have been misconstrued" by the employees. West
also testified that about a week prior to the election, he attended a Union meeting at a
McDonalds restaurant. While waiting for the meeting to begin, he observed Mike Nugent, the
40 Union representative drive up and they sat in Nugent's car talking for a few minutes. The next
day, when West arrived for work, Procak approached him and said, "I hear that you're mighty
chummy with the Union" and West asked, "Chummy, what's chummy?" Procak said, "I hear that
you were real friendly with the Union rep" and West answered, "Is it a problem with me talking to
45 a Union rep or being at a meeting because from what I understand, you've been handing me
flyers. I read the information that you give me and I ought to be able to attend one of the
meetings to hear what they have to say, too." Procak then repeated that he found it funny that
West was mighty friendly with the Union man. Procak testified that, prior to the election, he
never told West that he was chummy with the Union and never spoke to him about the Union
meeting at McDonalds.

50 On August 19, West was with Nugent at the Union office and saw Krise, who came to
the office to pick up Torres' uniform, standing in the doorway of the office. West said something

to Krise, who looked at him without saying anything and Nugent walked out of the office with Krise. West testified that on the following day, while he was doing his post trip paperwork in his truck in the yard at the facility, he observed Procak walking around the yard picking up weeds and cleaning the yard. Procak then walked up to his truck and said to West: "If you want to target somebody, why don't you target me?" West asked, "What do you mean target somebody? I haven't targeted anybody." Procak responded, "I told you that if you want to target somebody you target me. I'm the one you want to come after." West asked: "Come after? What are you talking about?" Procak then said, "I just find it mighty funny that you were at the Union hall" and West said that since it was his day off he should be allowed to go wherever he wanted. Procak then said, "Well, I'm going to tell you again. If you want to target somebody, target me." Later that day as West was in his car getting ready to leave, Procak approached him with a three foot stick in his hand and again said, "If you want to target anybody, you come after me. I'm the one that you want to come after." West got into his car and took out a note book and began writing what had occurred. Procak approached the car and asked him what he was writing and West said that he was writing everything that had just happened and at that point, he drove away. During this confrontation, West had called Larry Allen, and kept the connection going so that Allen could overhear the conversation with Procak. Allen testified that he was talking on the phone with West that day when West told him that Procak was coming to his car. He heard Procak say, twice, "If you're going to go after anyone, go after me. If you're going to go after him, go after me." Procak testified that on that afternoon, he was cleaning debris from the yard and had picked up a pallet about eighteen to twenty four inches long. West was standing next to his car and said to him, "By the way, I hear you're quite chum-chummy with the Union man." He said that because Krise told him that when he went to the Union hall to pick up Torres' uniform, he saw West there. West was writing something at the time and Procak testified that he had heard that some of the drivers were keeping notes in an attempt to have Branyan fired, so he told West, "Hey, you want to target somebody, target me." West said that he didn't know what he was talking about and West drove closer to the exit of the facility and stopped, and Procak approached his car and repeated, "John, if you want to target somebody, target me." At the point, West drove away. Krise testified that when he went to the Union office to retrieve Torres' uniform he saw West in Nugent's office, but did not tell Procak that he saw him.

Ditzler testified that a few days after the election he overheard Procak, standing in the doorway of the office that Branyan shares with Branyan, Luka and Rojas, telling them that everything was all right, and that he would make everything go slowly and that he would drag out the negotiations, and after a year the drivers would get tired and decertify the Union. Procak testified that he never said that, and never told employees that the Respondent would delay bargaining or would not bargain in good faith with the Union: "Quite the contrary, that we would bargain in good faith, but we would bargain hard, and we would bargain for what we believed in...it could take weeks, months, years."

Cajina testified that Branyan spoke to him about the Union on a few occasions prior to the election. On one of these occasions, while he was with Luis DeJesus, another driver, in the warehouse, Branyan said that they were going to get more work and that he would not allow the Union to come in. In addition, "he was going to remove two drivers from their work," naming Lewis and West. DeJesus testified that about two weeks prior to the election he and Cajina were talking to Branyan about the election. They told him that they had signed authorization cards for the Union and Branyan said that it was no big deal because the Union was going to lose the election, and they didn't need the Union because it wouldn't help them. Branyan testified that shortly before the election he had conversations with Cajina and DeJesus about the Union. He told them that he had been in a union and "...it would be hard...a long drawn out process." He said that it was easier when the company had a working relationship with the union, but Respondent and Del Monte did not have such a relationship with the Union. Cajina

told him that West and Lewis were leading the Union campaign “and that I need to watch them. And Henry would always say that they watch me because their main objection [sic] was to get me out of my position.” He never said that the Respondent intended to remove Lewis and West. Ditzler testified that about a week prior to the election, in his office, Branyan told him that if the
5 Union won the election, “it’s going to be different around here. Things are going to change. That, possibly, a third party carrier would be used more.” Branyan also said, “that we wouldn’t be able to get away with any of the things that we had been doing. That Procak would be watching heavily over us.” Branyan testified that Ditzler often came to his office with questions, sometime about the use of outside carriers, and Branyan told him that if any routes needed to be covered,
10 they would be covered by third party carriers.

Torres testified about a conversation that he had with Krise, in his office, about a month before the election. He told Krise that the drivers needed a union because two years earlier, the company cut their pay and never gave them back the money. Krise told him that the company
15 knew that Lewis and West were leading the Union movement and he didn’t understand it because they weren’t employed by the company at the time of the pay cut. He also said that they knew that a third person was also involved for the Union, but they didn’t know who that was. In a later conversation, he again told Krise that the employees needed a union to be on their side in disciplinary matters. Krise responded that the company didn’t want a union, and that
20 the employees would have to fight for it, because “the company wasn’t going to allow it.”

West testified about an incident that occurred in late November. On that day he was assigned to a route containing stops that he was unfamiliar with and it took him longer than usual. Near the end of his day he called Branyan to tell him that he was running out of time and
25 Branyan told him to call when he got to his next stop; at that time he again called Branyan and told him how his time was, and Branyan told him, “Go ahead.” When he got to his last stop, Western Beef, he called Branyan and told him that he didn’t feel that he enough time to make the stop and return to Eddystone, Branyan told him that Western Beef had been waiting for him, and would get him out quickly. After he was unloaded, he called Branyan and told him that it
30 looked like he would not be able to return in time and Branyan told him to start back, and to keep him informed. He ran into a traffic jam on the New Jersey Turnpike (it was the day before Thanksgiving) and he called Branyan and told him that there was no way he could get back in time and Branyan told him to call Krise, which he did. When he explained to Krise that there was traffic, and that he would not be able to get back to the facility in time, Krise told him to get a
35 hotel room and to call him if he had a problem. He found a hotel off the New Jersey Turnpike, checked in, and went to sleep. He was awakened by his cell phone ringing and it was Krise calling him. Krise told him that they had been trying to reach him, that they didn’t know where he was and they were about to call the police to report the truck missing. West said that Krise knew where he was and told him to call only if he had trouble finding a hotel; Krise said that he never said that. Krise told West that he wanted to know when he returned to Eddystone and that he should call him when he returned. It took about four or five days for West to get reimbursed for the hotel stay and when Krise gave him the express code that he needed in order to be
40 reimbursed, Krise told him, “John, you’re nothing but a problem to me and a problem to this company, why don’t you just go ahead and quit?”
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Krise testified that he received a call from West at about 3:45 on the afternoon prior to Thanksgiving saying that he was stuck in traffic on the New Jersey Turnpike and that he would not be able to return in time to Eddystone. Krise told him that he would return to the facility in about fifteen minutes and that West should call him at the time and he would look for a hotel for
50 him. West never called him back and he kept trying to call West for hours, without success. He was finally able to contact him at about 6:00 P.M. when West answered his phone call and said that he was at a hotel in East Brunswick, New Jersey. Krise testified that company policy is that

the drivers notify the company that they need a hotel a few hours in advance and he or Branyan then goes on the internet to locate an appropriate hotel to check on rates and whether the hotel can accommodate their equipment. On the day following Thanksgiving, West called him at home to ask how he would get reimbursed and he explained the procedure to him. West asked
 5 about being reimbursed out of petty cash and Krise told him that he could not be paid out of petty cash, that he had to follow the proper procedure for reimbursement and he "...was starting to get louder, more belligerent at that time, requesting that I go to my personal bank and get money and bring it to him." He testified further:

10 And then, I'd say about by the third phone call, he started to get even angrier, expressing his hatred for Tricont, the routing, the scheduling, management...I just had enough of Mr. West at that time. I said, "If you hate it here so much, why don't you just quit."

15 Krise testified that the procedure to be employed in these situations is that driver gives him the hotel bill, he approves it, forwards it to the office in Florida, where payment is authorized and forwarded to the office in Dallas, which issues an express code that the driver takes to any truck stop to get reimbursed, and West was reimbursed about four days later.

20 West also testified about a conversation with Krise in December. He went to Krise's office to tell him about a ticket he received for a seat belt violation. While discussing it, Krise said, "While you are here, I hear you had an incident with Johnny in the warehouse." West asked, "An incident?" and Krise said that he heard there was an incident where West punched the door. West said that he never punched a door and Krise said that he considered it as a
 25 threatening act. He said that an employee was once fired for kicking all the doors. He repeated that they considered it a threatening act and "I can fire you for that." He said that he couldn't get the other employee to testify, but, "we have something on you now." During this incident, West told Krise that it was starting to look like it might lead to discipline and he wanted to have his shop steward present. Krise told him that they don't have a union, a shop steward or a contract.
 30 West walked out of the office, saying, "Until I get my shop steward, I don't want to continue with this meeting." He did not receive any discipline for the door punching allegation. Cajina testified that he witnessed the door punching incident; West asked somebody to move some boxes and the individual refused. West then hit the door frame with his open hand. Krise testified that on about December 14 he told West that he heard of an incident where West was displeased with
 35 the way that his truck was being loaded, he got loud and punched the door; West denied it. West did not ask to have a Union representative present, but did ask if it was going to be a disciplinary meeting. Krise did not say that he could use the incident as reason to fire him. He was trying to "counsel" West not to be disruptive when his truck was being loaded and do something that somebody could view as threatening.

40 **E. Section 8(a)(3)(4) Allegations**

Torres testified that prior to the election, he had the Brooklyn-Queens run, which had a lot of miles and stops and, prior to July, he was working a six day workweek; however in July he
 45 worked two weeks in a row for five days a week. When Luka told him that he was not working the following day, a Thursday, he told Torres that it would give "you Union guys" more time to think about the election. Torres testified that on the following week, when Luka told him that he, again, would not be working on Thursday, Luka made the same comment again. Branyan testified that he never told Torres, or any other employee, that they would not work extra routes
 50 to give them more time to think about the election. Luka did not testify. Torres testified: "Always there was work on my route" and that Cajina drove his route on those two Thursdays in July. As to why Torres, or other drivers did not work extra routes the last week in July or the first week in

August, Branyan testified that all the routes were covered for those weeks.

5 Torres got a parking ticket for parking on the wrong side of the street and blocking traffic on August 9. He called Branyan, as he usually does in those situations, to tell him of the ticket. A few days later, Procak told him that he was writing him up for getting the parking ticket. Torres said that he didn't agree with it, and wouldn't sign it. Procak told him that he had to either sign the write up or pay the ticket and Torres refused saying that he didn't agree with the write up and the company always paid for their parking tickets. Procak said that he would have to do one or the other and Torres said that he would take the ticket, but he wouldn't pay it. Torres testified 10 that the company policy was that they paid for parking tickets, but the drivers paid for moving violations, such as speeding or cell phone use. The Respondent paid for the August 9 ticket. Procak testified (as did Torres) that generally the company pays for parking tickets and the drivers pay for moving violations. Torres' ticket was for wrong way parking, which he testified was a relatively new thing, but he considered it a moving violation. With wrong way parking 15 tickets, the company decided that they would pay the first ticket, then the driver pays the next one. When he told Torres to pay for the ticket and sign the disciplinary notice, he was under the impression that Torres had received a wrong way ticket earlier in the year and Torres did not say anything to refute it. He later realized that it was Cajina who had received that ticket and that is why the Respondent paid for Torres' wrong way ticket.

20 Torres testified that after he spoke to Krise about the parking ticket on August 12, Krise asked him if he falsified his log and Torres said that he did. Krise said, "Do you know that you can't be changing your log" and Torres said that it was normal procedure for the company to tell them to change their log. Krise said that he shouldn't be changing his log and Torres said that he had fifteen drivers who would say that the company tells them to change their logs: "that's 25 the normal procedure." Krise said that they can't change the logs because the company could get in trouble, and that he hoped the Union would back him up and, "I hope you have a good lawyer." On the prior day, August 11, he began driving at about 5:00 a.m. and drove to Brooklyn, New York and then back to the Eddystone facility. On the following day, Branyan asked him why he wrote in his log that he returned at 2:30, when he (Branyan) saw him in the 30 warehouse at 5:30. Torres said that Branyan had never previously questioned him about it, and he said, "I'll do another one if you want." Procak testified that on August 12, as he was driving to the facility, he received a call from Branyan saying that he was reviewing the prior day's trip sheets and noticed that Torres stated that he returned to the facility at 2:30, when he did not 35 return until 5:30. Procak told him to contact Torres and find out what was going on. Procak told Krise to notify Gulick and Sandy Rosenfeld, Respondent's Safety Coordinator for North America, and to obtain the EZ Pass records for Torres' truck. At about 5:00 he spoke to Torres on the phone and asked him, "What can you tell me about those three hours that are missing from yesterday?" and Torres said that he was doing paperwork while at a rest stop on the New 40 Jersey Turnpike. They were still awaiting the EZ Pass records when Torres returned to the facility on August 13 and Gulick instructed him that Torres was to be placed off-duty and suspended pending further investigation. When Torres returned, he told him that he was being suspended pending further investigation. When the company received the EZ Pass records for Torres' truck on August 11, it stated that he crossed the bridge at about 5:07.

45 Branyan testified that Torres returned from his route on August 11 at about 5:30. On the following morning he reviewed Torres' paper work for the prior day and concluded that the hours listed were less than it should have been, ten or eleven hours when, knowing the route, it should have been at least twelve hours. He forwarded the trip sheet to both Krise and Procak with 50 some question marks on it. He looked over Torres' log for August 11 and forwarded it to Krise. Later that morning he discussed the situation with Procak, who told him to speak to Torres to ask him what happened on the prior day. Branyan called Torres, who was on the road at the

time, and asked him about the prior day and why it was three hours short. Torres said that he was struck in traffic, and Branyan said, "For three hours?" Torres then said that he would fix it when he returned. When he returned on August 12, he turned in his paperwork and left without speaking to Branyan.

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Torres testified that on August 13 Branyan told him that Procak was looking for him and he went into the office and Branyan and Krise were present along with Procak, who closed the door behind him. Torres sensed that it was to be a disciplinary meeting and asked if he could have his shop steward present with him, but Procak kept talking and did not respond to his request, saying that he had falsified his log and that he would be suspended pending an investigation about the missing time. Torres asked, "Don't you know that we normally change our logs?" and Procak answered that he didn't know that. Torres pointed to Branyan and said that he knew since he was the one who told the drivers to change their logs. Procak said that he didn't know about that, but that Torres would be suspended until Monday, and he would call Torres at that time. He did not call on Monday, but on Tuesday, August 17, Branyan called him and told him to come to a meeting with Krise and Procak at 2:00 that day, and to bring all his equipment with him. Torres attended the meeting with Nugent as his representative; Procak and Krise were there for the Respondent. He testified that Procak accused him of stealing the truck for two hours, that they didn't know where he was, and that he was being terminated for falsifying his log. Nugent asked if they tried to call him or the police if they thought that the truck was missing, and he said that they didn't. Torres was given a Disciplinary Notice stating that he was terminated for "Policy violations," stating: "You were seen arriving at the facility at 17:30. According to your driver trip sheet and log you finished and logged yourself out at 14:30, thereby leaving three hours unaccounted for...Falsifying your log is the basis for your termination from the Company."⁶ Ditzler testified that after Torres was fired, he and Wilbur spoke to Branyan, who told them that Torres was fired for falsifying his log. Ditzler asked him how the company could fire somebody "over something that you guys want us to do...that's basically how we've been trained." Branyan said, "With the Union vote things have changed" and that Procak is watching everything that they do.

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Procak testified that prior to the election he had no knowledge of whether Torres supported the Union and during that period he had a few conversations with him about the Union. On one occasion, when he gave Torres one of the company's handouts about the Union, Torres told him, "I haven't heard anything from the Union" and Procak said, "Well, that's your answer right there." On another occasion, Torres told him that he heard from the Union and "they're talking about \$28 an hour." Gulick made the decision to terminate Torres, and he informed Torres of that decision on August 17 and gave him his termination notice on that day as well. Torres did not say anything at the meeting. He testified further that during the investigation of the unfair labor practice charge that the Union filed regarding Torres' discharge, Torres claimed that other drivers also falsified their logs. At that time he had no knowledge of that, but the Respondent decided that it had to investigate the allegation. In that regard, Gulick directed an investigation into the allegation, which included an examination of the logs of certain drivers for a six month period beginning in April, compared with the EZ Pass records for their trucks, and told them to have some of the drivers meet with counsel for the Respondent about the subject. In addition, Procak and Krise were to speak to drivers whose records showed discrepancies and see if they had an answer to the discrepancies. Procak testified that at these

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⁶ In February 2008 Torres was given a Disciplinary Notice for having a thirty three and a half hour Reset period, rather than the required thirty four hour period, and in May 2008 he received another Disciplinary Notice for failing to notify Branyan of an accident immediately after the accident.

meetings none of the drivers requested that a Union representative be present with them. Subsequently, the comparison of the logs and EZ Pass records revealed that Torres had twelve discrepancies on his logs from March 11 to August 11 that could not be accounted for. Procak, who has been employed by Del Monte for eleven years, testified that during that period, five or six employees have been disciplined for DOT violations, but none have been terminated or suspended.

Cajina had been employed by the Respondent as a driver beginning January 20. He testified that after Torres was fired, Branyan told him that he and DeJesus would cover his route. In December Branyan told him that he was to meet with Krise and Procak about the EZ Pass records; he testified that Branyan told him, "Just say that you don't recall." At the meeting, Procak asked him about three dates where there appeared to be discrepancies between his log and the EZ Pass records. Cajina told them: "All of those things are not lies. Those are all items that were favors for Bob Branyan." They said, "Okay" and he left. Krise testified that on that day he attempted to give Cajina a Violation Summary Letter stating that on September 23 he had an eleven hour driving violation, but Cajina refused to sign it. Cajina did not ask to have Union representation at this meeting.

On January 6, 2011, Cajina reported back to the facility after doing his run and Krise told him that Procak wanted to see him in his office. Cajina asked Krise, "Is this a disciplinary action?" and Krise said that he didn't know. Cajina saw Procak and said that if it was a disciplinary action, he wanted to have a steward with him. Cajina called his steward, who said that because the company also fired somebody else that day, he would not be available to assist Cajina until the following day. Cajina went to his car and Procak came out of the office with a piece of paper. He handed the paper to Cajina and told him that he was fired for violating company rules, and mentioned that the EZ Pass records didn't match his log. Gulick testified that when he saw from the audit that Cajina had about fifteen violations, he recommended to his superiors that he be fired. Procak testified that Cajina was asked to come into his office, but he asked for Union representation. When they learned that a steward would not be available until the following day, Procak "...carried on with the termination, told Henry that he was terminated for policy violation, falsification of company records." He did not ask Cajina any questions, he just told him that he was terminated. The Disciplinary Notice given to Cajina states that he was fired for "...the falsification of company records. A recent company audit revealed that Henry had approximately seventeen (17) incidents of driver log falsifications between April 20, 2010 and September 24, 2010. As a result, Henry is being terminated."

The Respondent conducts regular safety meetings for the drivers⁷ and a notice was posted announcing a mandatory safety meeting for 6 a.m. on September 9. Ditzler completed his route on the prior day at 8:30 p.m., leaving him only nine and a half hours between the run and the safety meeting. He arrived at the safety meeting at 6:15, fifteen minutes late, and fifteen minutes before the end of the ten hour rule, and when he arrived, Krise told him that he was late. On his log for the day he did not write that he arrived at the meeting at 6:15; rather, he wrote that he started work that day at 9:00, and attended the safety meeting from 9:00 to 10:00. On about the following day, Krise told him that he wanted to talk to him. He went into the office and Procak asked him to explain why he came late to the safety meeting, and Ditzler said that he had to go because it was mandatory. Procak said that Florida wants him to write a letter

⁷ There were safety meetings scheduled that day at 3:00 and 6:00, as well. In addition, if drivers cannot attend any of the scheduled meetings on that day, the Respondent provides "one-on-one" safety meetings when the driver is available. In fact, Branyan and Lewis were not able to attend the meetings, and attended one-on-one meetings with Krise.

explaining what happened, he gave the letter to Procak and said that he would see him the following day. When he reported for work later in September, Branyan told him that Krise wanted to see him. Krise asked him what he was doing at the facility, "Didn't Bob tell you?" Ditzler said that he didn't. Branyan said to Krise, "I thought you told him." Krise then told him, 5 "You've got to leave. You're off today." Ditzler asked if he was being suspended and Krise answered, "You've got to leave." Krise walked him to his car and told him that he was being suspended. Subsequently, the company and Nugent worked out an agreement that Ditzler would return to work on October 8, which he did, and Ditzler was given a Disciplinary Notice 10 dated October 8 for failing to adhere to the ten hour requirement between shifts and for improperly listing on his log that he attended the meeting at 9:00, noting that he had been off duty since September 29. Krise notified Gulick by email on September 10 about the September 9 incident and Gulick passed on the information to the Respondent's Human Resources Department. The reason for the delay between September 10 and September 29 was the crush 15 of other business. Gulick testified that it was decided that Ditzler would be suspended, rather than fired, because the Respondent's one-on-one policy was not in writing.

On September 23 Kathleen O'Neill, who was investigating the Union's unfair labor practice charges for the Board sent an email to counsel for the Respondent requesting eighteen 20 items regarding: "Follow-up questions Tricont... One of the items requested was: "In or around September 2010, did the Employer learn that driver Bill Dissler [sic] falsified his log? Please describe the investigation into this matter and what type of disciplinary action was taken."

Prior to the election, Ditzler's assigned days off were Thursday and Sunday, but he often worked Thursdays in the busy part of the season. During slow periods, he had Saturdays off. 25 About two weeks after the election he told Branyan that he could work the following day, but Branyan said, "you can't." When Ditzler asked why, Branyan said, "With the two cases with the Labor Board charging us with forcing guys to work on their days off, Mike is done, he won't do it anymore. He said that everyone takes a day off." Branyan testified that Procak never said that to him. Branyan also testified that in the Fall of 2010, Krise told him to keep all employees under 30 sixty hours during an eight day period: "It was company-wide because volume and sales were down." If employees were approaching sixty hours and he suspected they would exceed sixty hours, he had to notify Krise, who notified Gulick to obtain approval. Gulick testified that, for over ten years, in the Fall, with the change to Daylight Savings Time, the company tries to reduce drivers' hours because it gets darker earlier and drivers tend to get fatigued earlier. In 35 addition, the company's sales and volume were down so he told all regional managers to try to keep drivers' weekly hours to sixty.

Ditzler testified that one day after he returned to work, Krise told him, "I hear that you're starting trouble at the port." Ditzler responded that he had only been back one day, and Krise 40 said, "My eyes and ears are watching you." This testimony is confusing because it appears that this relates to an alleged incident involving Ditzler at the port on December 30, rather than early October. Branyan testified that Ditzler called from the port that day and said that he was running late, and Branyan told him that he had to check out and return to Eddystone. He called back and told Branyan that he was having trouble checking out, "he was frantic," drove in an area he 45 should not have been and was involved in a "confrontation" with somebody at the port. Branyan told him to calm down, and that he would get Krise involved, and that was the extent of Branyan's participation. Ditzler testified that in early January 2011, Branyan told him that he had received an email from somebody at the port saying that he had created a disturbance there on his checkout. On the following day, as he was checking in at the port, he asked a woman 50 employed there whether he did anything to create a disturbance, and she answered no. When he returned to the facility, he told Branyan about the conversation, and offered him the woman's phone number.

Ditzler was not scheduled to work on January 6, 2011, but he received a call from Branyan that morning saying that he needed him to work that day. He arrived at the facility at about noon and, when he got there, Branyan said, "Please see Jesse, he wants to talk to you." When he got there, Krise said, "We have to go over to Procak's office." Ditzler asked, "Am I in trouble? Do I need my steward?" Krise did not respond, they went to Procak's office and Krise shut the door behind him. Procak said, "Did you have any problems at the port a couple of days ago?" Ditzler replied, "Not that I know of" and Procak said that they were accusing him of starting trouble. Ditzler said that he knew of the allegations and had spoken to the woman at the port who handles the paperwork and asked her if he had done anything wrong and she said not that she knew of. He offered to give Procak her telephone number if he wanted to check on it. Procak then said, "Well, I figured you wouldn't want to sign this write up" and told him that he was being terminated for EZ Pass violations where his log⁸ did not match EZ Pass records. He told him to take his personal possessions from his truck, and Krise escorted him to his truck to do so. The Disciplinary Notice, dated January 6, 2011, that he was given by Procak that day states:

On January 4, 2011, William Ditzler was reported by the port personnel in Gloucester displaying unprofessional conduct and inappropriate behavior. William was instructed to wait by port personnel for a few minutes so that they could load one more box on his truck that was an important transfer to the Jessup DC. William, as stated by port personnel, threw a fit and stormed out of the warehouse when requested to wait for the one case to be loaded. William has a pattern of this behavior. This is a written warning.

Procak testified that the investigation of log discrepancies showed that Ditzler had a lot of discrepancies on his logs, in fact, he had twice as many as Cajina. Ditzler was called into the office on January 6, 2011; he and Krise were present for the Respondent. Ditzler did not ask to have a Union representative present with him at the meeting. Procak told him that he was being terminated for policy violations in that he falsified company records based upon the company's recent audit. Ditzler responded that he would see him in court. Gulick testified that the audit showed that Ditzler had about forty violations (Cajina had the next highest number with fifteen and no other driver had similarly high numbers of violations) and he instructed Procak to meet with Ditzler and tell him that he was being terminated for the falsification of his logs. His termination notice dated January 6, 2011, states that he violated Respondent's policies on falsification of records and that a recent audit revealed approximately forty log falsifications between April 5 and August 26. Ditzler had received two other written warnings from the Respondent: one on January 13, 2009 for his "failure to prevent an avoidable accident," and the other on March 18 (signed by Branyan as "Supervisor/Manager") for "poor interaction" with other drivers in order to get more work. The Disciplinary Notice states that during the discussion of this warning, Ditzler started to "raise his voice in discontent," which is not acceptable and would not be tolerated.

In addition to the allegation that in about October and November the Respondent introduced a policy whereby the drivers were no longer permitted to work on their days off, thereby reducing the work hours of Ditzler and the other drivers, the Complaint alleges that the Respondent assigned less work to Lewis, Torres and West because of their support for the Union, and without first bargaining with the Union, in violation of Section 8(a)(1)(3)(4)(5) of the

⁸ Counsel for the General Counsel introduced into evidence Respondent's Violation Summary Letters from September 1, 2009 through July 31, all stating that no violations were found for Ditzler during this period.

Act. West testified that prior to the Union campaign, he usually worked six days a week, Monday through Saturday. After the campaign began, he was assigned routes with fewer stops (the drivers are paid based upon their mileage and stops) and after that he began getting Thursday off on a regular basis; prior to the Union campaign he was off on Thursdays "very seldom."

5 When he asked for more work he was told that work was slow. Lewis testified prior to the election he usually worked five days a week with four to five stops on each route. After the election he usually worked four days a week with one to three stops on each route.

10 Branyan testified that he was never told that he should not schedule a driver because of pending unfair labor practice charges that were filed by the Union. Procak testified that drivers are offered work on their days off, "when we have it available." It is offered to the drivers when they return from their run; some accept the extra work, some don't. If they can't get a driver to cover the route, they call in a third party carrier. Respondent produced a summary of drivers who worked six day weeks from April through February 2011. It states that from the weeks
15 ending April 2 through July 9, three to six drivers worked a six day week. From July 16 through August 20, zero to three drivers worked a six day week. For the weeks ending August 20 through February 25, 2011, three drivers worked a six day week once, five worked twice, eight worked once, and for the remaining twelve weeks none of the drivers worked a six day week. Respondent also produced a summary of runs by third party carriers during 2010. The
20 Respondent employed third party carriers on twenty three occasions in 2010; all but three were night runs to the Hunts Point market in the Bronx. The reason that they used third party carriers so often on this route is that it usually leaves the warehouse at about 5:00 P.M., at a time most of the drivers are just returning from their run, and have probably used up their ten hours driving time. For employees off that day, it would be equally difficult to use them to cover the Hunts
25 Point run because they would not be able to take their regular route on the following day.

Faunce, who has been employed by the Respondent as a driver for four years, testified that prior to the election, his regular days off were Wednesday and Sunday, but he regularly worked on Wednesdays as his sixth work day. On cross examination, he testified that there
30 were some Wednesdays that he worked, and some that he didn't work. The summary prepared by Respondent states that for the nineteen weeks ending the week ending August 6, Faunce worked six- six day weeks. For the nineteen weeks after the week ending August 6, he worked five- six day weeks. Shortly after Torres was fired, the drivers were told that they had to take their regular day off, and Branyan told him that they had excess hours and, "...we're going to try and keep the hours down."

F. Section 8(a)(1)(5) Request for Information Allegation

40 Nugent testified that the employees told him that they were no longer assigned to work on their days off and he asked the company representatives about it at one of the bargaining sessions. The company's response was that work was slow. By letter dated November 18, counsel for the Union wrote to counsel for Respondent:

45 During the course of yesterday's negotiations, the Company stated that the reason that members of the bargaining unit were working less was due to a drop in business. In order to verify that contention, the Union requests it be provided with sales or similar records detailing that drop in business for the past 24 months.

By letter dated November 23, counsel for the Respondent stated:

50 I have reviewed your request of November 18 that Tricont provide sales or similar records detailing a drop in business in the past 24 months. Fresh Del Monte Produce,

Inc., Tricont's ultimate parent corporation, only reports aggregate sales in its public filings. Breakdowns of sales figures by location or customer are confidential and proprietary. Accordingly, Tricont will not be providing this information to Local 107.

5 As I advised Local 107 on November 17, if employees are not working their days off, it is because no work is available. If work were available, someone would be doing it; if not the employees, then third-party carriers or temporary drivers. I sent you by letter dated November 9, a listing of all the third-party carriers used in 2010 through October. That listing shows the use of third-party carriers is down. Moreover, the Eddystone facility has not used temporary drivers since June 28. I asked what, if any, evidence Local 107 had that someone other than Tricont's drivers was doing this work. I received no response.

G. December 20 Bargaining Session

15 There was testimony from Nugent and Thomas Bender, Esq., counsel for the Respondent about a bargaining session held on December 20. Nugent testified that Bender said that since the Union won the election by a 10 to 9 vote, there would not be much support for the Union and therefore the Respondent would oppose a union security clause. After hearing this comment, Nugent told Lewis that he should get the drivers to sign membership cards for the Union to show that it had the drivers' support. They obtained sixteen membership cards and he brought the signed cards to the next meeting on December 20, put them on the table face down, and said that he wanted to show the company that they had the support of the drivers. Counsel for the Union, Thomas Kohn, said that he didn't want the cards to leave the room. At one point, the parties took a break and Nugent noticed that Bender and Procak left the room and the cards were no longer on the table. Bender testified that at the negotiations, the Union proposed the usual union shop clause requiring present and future employees to join the Union within a certain time. The company response was that since the vote was 10 to 9, a union shop clause was inappropriate. At the next meeting, attorney Kohn showed him the membership cards and told him that he could examine them, and he looked at the cards and counted them, although he did not show them to anyone else, nor did he tell his client the names of any of those who had signed the cards. After looking over the cards, he told his client that the Union had the cards that they said they had, and at the next meeting, he changed his response to the Union's union security proposal.

35 IV. Credibility Determinations

There are numerous credibility determinations to be made herein, some easier than others. The subject principally affected by credibility, and the underlying subject of the hearing, is the maintenance of the drivers' logs and whether the Respondent was aware that some of the drivers were falsifying their logs prior to August. I found Faunce, Baylor and DeJesus to be the most credible of the witnesses. Faunce, who is still employed by the Respondent, appeared to be reluctant to testify about falsifying his logs and did not do so until redirect examination. Baylor, DeJesus, Allen and Cajina likewise appeared to be testifying in an honest and truthful manner, and without exaggeration. Torres, West and Lewis, while credible, were often uncooperative and hostile witnesses, who appeared anxious to tell the story their way, rather than answer questions from counsel for Respondent, and Ditzler, while also appearing to be a credible witness, had difficulty answering a question directly, preferring to do it his way. Taylor, Pflugh, Sauler and Cole, all presently employed by the Respondent and called as witnesses by the Respondent, also appeared to be testifying in an honest and credible manner. Of the Respondent's witnesses, I found Procak to be the least credible witness and, generally, when there is a conflict in testimony, I have discredited his testimony. I found Branyan and Krise to be more credible than Procak, but most often I have discredited them when their testimony conflicts

with more credible testimony from others.

V. Analysis

5 A. Branyan’s Supervisory Status

The initial issue is the supervisory status of Branyan. Counsel for the General Counsel alleges that he is Dispatcher/Lead Driver for the Respondent at the facility, and a supervisor and agent of the Respondent under Section 2(11) and 2(13) of the Act. Respondent alleges that he is the lead driver and is in the unit. Section 2(11) of the Act defines a supervisor as:

15 Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

20 The burden of establishing supervisory status rests with the party attempting to assert it, and such proof must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). In addition, the alleged supervisor need only possess one of the listed indicia of supervisory authority so long as it requires the use of independent judgment, rather than being merely of a routine or clerical nature, and it must be carried out in the interest of the employer. *Croft Metals, Inc.*, 348 NLRB 717 (2006). The issues involving Branyan are whether he can effectively recommend the hiring or discipline of employees and whether he responsibly directs the work of employees. *Oakwood* states, at p. 691, that “...to be ‘responsible’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other...” and that in order for the exercise to involve independent judgment, it “...must involve a degree of discretion that rises above the ‘routine or clerical.’” Based upon those guidelines, I find that Branyan is a supervisor within the meaning of the Act primarily because he directs the work of the drivers and can effectively recommend the hiring or discipline of the drivers. It is undisputed that the drivers regularly call Branyan from the road; sometimes these calls relate to problems with their trucks or problems with customers, and these situations clearly do not require Branyan to use independent judgment. However, the drivers also call him when they are approaching the maximum number of hours allowed by DOT rules and they have not completed all of their deliveries. It is on those occasions that Branyan must, and has, directed employees either to return to Eddystone or to complete their deliveries and on those occasions he has exercised independent judgment in that he must balance the importance of the remaining deliveries with the possibility that the driver will exceed the allowable hours. I find that Branyan has done so, and on a regular basis.

45 I also find that he can, and has, effectively recommended the hiring and the discipline of the drivers. He testified that he has recommended that certain employees not be hired if he felt that safety was involved, after taking the applicant on a road test, and that he “effectively recommended” that certain people be hired. Ditzler testified that Branyan told him that “he had it with Dave Weir” and was going to suggest that he be written up and fired, and he was fired; Branyan testified that he only “forwarded the situation” to Halcomb. I credit Ditzler’s version of this incident. West testified to a similar situation where Branyan told him that he was having problems with a driver and Branyan told him, “and if he keeps on doing it I’m going to have to fire him,” and I credit this testimony as well. Although there was no direct evidence to establish that he could fire or discipline an employee on his own, or that his recommendations to this effect are effective, I note that the Respondent did not refute this evidence by showing any

instance where the Respondent overruled any of Branyan’s recommendations. *Donaldson Bros. Ready Mix, Inc.* 341 NLRB 958, 962 (2004). Additionally, many of the Respondent’s disciplinary warnings are signed by Branyan as “Supervisor” and/or “Manager.” This, together with his responsible direction of the drivers, as discussed above, and “secondary” evidence, such as that he only drives about five percent of the time, and is the only driver who has an office and the choice of wearing a uniform or street clothes, convinces me that he is a supervisor within the meaning of Section 2(11) of the Act.

B. Section 8(a)(1) Allegations

There are numerous allegations of Section 8(a)(1) violations by Procak, Branyan, Krise and Luka. As stated above, I found Procak to be the least credible witness, one who, it appears, took the employees’ union activity personally, as evidenced by his confrontation with West in the parking lot at Eddystone in August. I therefore credit Torres’ testimony that, in about July, Procak told him that the company would not offer anything to the Union. I find that this statement violates Section 8(a)(1) of the Act as a threat of the futility of engaging in union activities. West testified that a few days prior to the election, Procak approached him, handed him a flyer, and told him that after the election, no matter who won, he would “clean house.” When West asked him what if he voted no, Procak said, “I’m still going to clean house...I’m still going to get rid of you.” Again, I discredit Procak’s testimony and find that these statements represent a threat of retaliation for the employees engaging in union activity, in violation of Section 8(a)(1) of the Act. West also testified that on about August 1, a day after sitting in a car with Nugent and attending a Union meeting, Procak told him that he heard that he was “mighty chummy” or friendly with the Union. Although Procak denies making this statement, I, again, discredit him and find that this statement was made and creates the impression that the employees’ Union activities were under surveillance and violates Section 8(a)(1) of the Act. The next incident is the August 20 confrontation between Procak and West in the yard at Eddystone. In this strange situation, Procak said, and repeated on a number of occasions, “If you want to target somebody, target me” while carrying a large piece of wood. Procak, while basically admitting that he said that, testified that he did it because the drivers were trying to get Branyan fired and he wanted them to go after him instead. Regardless of the reasons for his actions, they can be interpreted as a threat of violence for engaging in union activities, as well as creating the impression that the employees’ union activities were under surveillance by the Respondent, and violates Section 8(a)(1) of the Act. *Corporate Interiors, Inc.*, 340 NLRB 732 (2003).

A few days after the election Ditzler overheard Procak telling Branyan, Luka and Rojas that he would drag out negotiations, make everything go slowly and, eventually, the drivers would get tired and decertify the Union, and I credit his testimony over Procak’s denial. This violates Section 8(a)(1) as a threat to prolong negotiations to convince the employees of the futility of their choice of the Union. Cajina testified that prior to the election, Branyan told him that he would not allow the Union to come in and that he was going to fire Lewis and West. Branyan denies this, testifying that he told Cajina and DeJesus that bargaining would be a long drawn out process, especially because Respondent did not have a relationship with the Union. Although I found Cajina to be a credible witness, in this situation I credit DeJesus’ testimony that after they told Branyan that they had signed Union authorization cards, he told them that it was not a big deal because the Union was going to lose the election and they didn’t need a union. I therefore recommend that this allegation be dismissed. Ditzler testified that about a week before the election, Branyan told him that things would be different if the Union won the election and that “possibly,” the Respondent would use more third party carriers. He also said the drivers wouldn’t be able to get away with the things that they had been doing and that Procak would be watching heavily over them. Branyan denies making these statements, but did tell Ditzler that if

5 routes needed to be covered, they would be covered by third party carriers. Although I found Ditzler to be a difficult witness who wanted to answer the questions his way, rather than as asked by counsel for the Respondent, I credit his version of this discussion, and find that Branyan's statements violate Section 8(a)(1) of the Act as a threat to discriminate against the employees if they chose the Union in the upcoming election.

10 Torres testified about a conversation that he had with Krise, in his office, in July. He told Krise that the employees needed a union because two years earlier the company had reduced their pay and never gave it back. Krise said that the company knew that Lewis and West were the leading Union proponents and that there was a third person, but they didn't know who that was. In a later conversation, when he told Krise that the employees needed a union to be on their side in disciplinary meetings, Krise said that the employees would have to fight for the Union because "the company was not going to allow it." I find that these statements by Krise violate Section 8(a)(1) of the Act by creating the impression that the employees union activities were under surveillance by the Respondent and threatened that it would be futile for the employees to choose the Union as their bargaining representative. West testified about the hotel incident in November that ended with Krise telling him that he was a problem for the company and for him, and "why don't you just go ahead and quit." Krise testified that he did make that statement to West, but it was in response to West's expressed displeasure about the method of being reimbursed for the hotel cost and his belligerence and hatred for the company. At that point, he "had enough" of West and told him that if he hated the company so much, he should quit. Although I found West to be a credible witness, I credit Krise's testimony about the events leading up to the alleged statement, and find that it was made in response to West's anger at the difficulty of getting reimbursed for the hotel bill, rather than in retaliation for his Union activities. I therefore recommend that this allegation be dismissed. Torres testified that in July, when Luka told him that he would not be driving on the following day, he told Luka that he always worked on his regular day off. Luka replied, "That will give you union guys more time to think about the election." I find that this undenied threat violates Section 8(a)(1) of the Act.

30 West testified that at the "door punching" incident in December, Krise told him, "I can fire you for that" and, "we have something on you now." West told Krise that as it might lead to discipline, he wanted his shop steward present and Krise responded that he didn't have a union, a shop steward or a contract. West walked out, saying, "Until I get my shop steward, I don't want to continue with this meeting." Krise testified that he did not tell West that he could use the door incident as a reason to fire him, and that West did not ask to have a Union representative present, although he did ask if it was going to be a disciplinary meeting. As I credit West's testimony over that of Krise, I find that the statements: "I can fire you for that" together with "we have something on you now" violates Section 8(a)(1) of the Act as a threat in retaliation for West's Union activities. However, I recommend that the balance of this allegation be dismissed. Employees who are represented by a union have a right to union representation when they reasonably believe that the investigation will result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975). However, when Krise claimed that he didn't have a union, West walked out and was never disciplined for the door punching incident. *Fruehauf Trailer Services, Inc.*, 335 NLRB 393 (2001).

45 There is an additional *Weingarten* allegation that occurred in about October, when Branyan gave Cajina a violation, allegedly, based upon an error in his log, but Cajina refused to sign the violation. Branyan told him to see Krise, who handed him the violation and asked him to sign it, but Cajina refused, asked if it was a disciplinary action and Krise asked, "What are you going to do?" Cajina said that he needed to speak to his shop steward, and Krise said, "What the fuck is Barry going to do for you?" Cajina left the office and Krise told him, "You've dug your own grave. This is a verbal warning." Although I credit Cajina's version of this incident over that

of Krise, I recommend that the allegations regarding this incident between Krise and Cajina be dismissed. The two statements that he made to Cajina can be interpreted in a number of ways rather than being seen as threats to Cajina due to his support for the Union. Additionally, *Weingarten* provides for union support at a meeting where the employees reasonably believe that the investigation will result in disciplinary action, which was not the situation herein. The Respondent had already decided on the discipline and the purpose of the two meetings (with Banyan and Krise) was to get Cajina to sign the violation. As the discipline was already decided upon, Cajina was not entitled to any representation at the meeting, and I recommend that this allegation be dismissed.

C. Allegations of Discrimination

I do not credit the testimony of Branyan, Procak and Krise that they were unaware of the fact that some of their drivers were regularly falsifying their logs when they exceeded the number of hours that they were driving or on duty, or in order to be able to drive the following day. In fact, it is clear from the credited testimony that, at least, Branyan encouraged it. It strains credulity to believe that they were not aware of the falsification of the logs or, as West testified, "It's kind of impossible" that they didn't know. Although I found Taylor, Pflugh and Sauler to be credible witnesses, the fact that they did not falsify their logs, and had no knowledge of other drivers doing so, does not alter my conclusion that the Respondent's agents were aware of it. I note that Sauler testified that although he was never encouraged to falsify his log, he was "...aware of conversations" on the subject.

The initial allegation in this category involves a ticket that Torres received on August 9 for parking on the wrong side of the street. This allegation can be described as "much ado about nothing." Stated briefly, as regards this allegation, I credit the testimony of Procak that this violation was relatively new to him and that the company policy was that they paid for the first one and the driver paid the next. He mistakenly believed that this was the second wrong-way parking ticket that Torres had received and that is why he, initially, told Torres that he would have to pay it. When he later realized that it was Cajina who had gotten the earlier violation, the company paid for Torres' August 9 ticket. I therefore recommend that this allegation be dismissed.

The record establishes that for the seventeen weeks beginning with the week ending April 2, Torres worked six day weeks for all but one of those weeks and, as he testified, he did not again work a six day week over the next two weeks and was fired on August 13. During the week ending July 30, when Luka told him that he would not be working on his day off, Luka told him that it would give "you union guys" more time to think about the election. In telling Torres that he would not be working on his day off the following week as well, Luka repeated that comment. In addition, the Respondent was aware of his Union activities. In July Torres told Krise that he thought that the employees needed a union and in discussing the Union with Procak, asked what the company would offer if the Union asked for \$28.00 an hour. This convinces me that the Respondent reduced his work days from six to five for the weeks ending July 30 and August 6 due to the employees union activity, in violation of Section 8(a)(1)(3) of the Act.

There are two facts that convince me that Torres' termination was pretextual and discriminatory. One is the timing.⁹ The Respondent engaged in an active anti-Union election

⁹ *National Steel Supply, Inc.*, 344 NLRB 973 (2005); *Weldon, Williams & Lick, Inc.*, 348 NLRB 822 (2006).

campaign, which is its right, but it also crossed the line, on occasion, during this campaign. Further, within a week of losing the election, Respondent suspended and then fired Torres for something that he, and many of the other drivers, had been doing openly for some time. I also found persuasive the fact that Respondent had never previously fired a driver for falsifying their logs. Under the test in *Wright Line*, 251 NLRB 1083 (1980), I find that Counsel for the General Counsel has established that the employees' Union activities, as well as Torres' Union activities, was a motivating factor in the decision to suspend and fire him, and that the Respondent has not satisfied its burden that it would have fired and suspended him even absent the Union activity. I therefore find that by terminating Torres on about August 13, the Respondent violated Section 8(a)(1)(3) of the Act. Clearly, the drivers (primarily) and the company were responsible for seeing that the DOT rules were enforced. I have found that the Respondent was aware that drivers were falsifying their logs and, in fact, at times encouraged it and only began strictly enforcing the DOT rules after the Union won the election. *Southern Mail, Inc.*, 345 NLRB 644 (2005) is right on point. Prior to the union being certified to represent some of their drivers, the employer was "relatively lenient" in the drivers' compliance with DOT rules, "and even helped its drivers circumvent the regulations." In addition to finding that the employer violated Section 8(a)(1)(5) of the Act by changing its policy regarding enforcing these DOT rules, the Board found it violated Section 8(a)(1)(3) of the Act, under *Wright Line*, stating that the General Counsel met his initial burden:

There is abundant evidence of the Respondent's motivation to retaliate against employees for their election of a union bargaining representative. The Respondent repeatedly threatened its drivers with adverse consequences if the Union won the election. Immediately after the election, it deviated from past practice and discriminatorily discharged Union supporters Pinkston and Marks for alleged timecard violations...

We also find that the Respondent failed to show that it would have more strictly enforced its DOT log disciplinary policy even in the absence of its drivers' union activity. We do not question the legitimacy of an employer's need to comply with Federal regulations in its industry. The regulations and Respondent's compliance with them are not at issue here. The issue concerns how the Respondent dealt with drivers who fail to comply with its regulations. The record shows that the Respondent felt no need to discipline drivers for failing to comply with DOT regulations until after they chose to be represented by the Union.

I find the instant situation similar and find that by more strictly enforcing the DOT rules regarding driving and working hours, the Respondent violated Section 8(a)(1)(3)&(5) of the Act.

Cajina had been employed by the Respondent for a year until he was fired on January 6, 2011. During the Union campaign he told Branyan that he had signed a Union card, but that he would vote no in the election. Branyan told him that they would not let the Union come into the company and that they were going to fire West and Lewis. Cajina's situation differs from Torres' in that Cajina was fired five months after the election, while Torres was fired seven days after the election. However, I find that the result should be the same. I find that Counsel for the General Counsel has sustained her initial burden under *Wright Line* that the employees' Union activities, not simply Cajina's, was the motivating factor in the Respondent's more strict enforcement of its DOT rules, resulting in Cajina's discharge. I also find that based upon the lack of enforcement of the rule, and the lack of discipline of employees for violating the rules, prior to the advent of the Union, the Respondent has not satisfied its burden that it would have fired Cajina even absent the employees' decision to choose the Union as their bargaining representative. His termination on January 6, 2011 therefore violates Section 8(a)(1)(3) of the Act.

5 It is next alleged that beginning in about July, for Lewis and West, and on about October
15, for Ditzler, the Respondent assigned less work, and reduced the work opportunities, to
those drivers in violation of Section 8(a)(1)(3)(4)&(5) of the Act. An analysis of the Respondent's
summary of six day workweeks from April through December, establishes that for the nineteen
10 week period prior to the election, Ditzler worked four six day weeks, West worked six, and Lewis
did not work any six day weeks during that period. For the twenty one week period from the
election until the end of the year, Ditzler worked one six day workweek, West and Lewis did not
work any. Ditzler testified that about two weeks after the election he told Branyan that he was
15 available to work the following day, one of his days off. Branyan said that he couldn't because
there was an unfair labor practice charge with the NLRB alleging that the company was forcing
employees to work on their days off and, "Mike is done, he won't do it anymore. He said that
everyone takes a day off." Respondent defends that reducing hours was a company-wide policy
caused by a drop in sales and the change to Daylight Savings time. Initially I recommend that
20 the allegation regarding Lewis be dismissed as he did not work any six day weeks in 2010
before or after the election. Based upon the credited testimony of Ditzler that Branyan said that
Procak told him not to schedule anymore six day work weeks because of a pending unfair labor
practice, I find that by reducing the working days, and hours, of West and Ditzler, the
Respondent violated Section 8(a)(1)(4) of the Act.

25 The next allegations relate to the suspension and Disciplinary Notice given to Ditzler for
violating DOT rules and being late for the September 9 safety meeting. It is alleged that the ten
day suspension effective September 29 and the warning dated October 10 violated Section
8(a)(1)(3)&(4) of the Act. What is lacking in Counsel for the General Counsel's case is a link
between the Union activity and/or the unfair labor practice charges, and Ditzler, as well as the
fact that his infraction regarding the September 9 safety meeting is distinguishable from the log
falsifications, which had been going on for some time. The initial charge and amended charge
were filed by the Union on August 17 and August 18, and Board Agent O'Neill's email to
30 Bender, mentioning Ditzler among her eighteen requests, was sent on September 23. There is
no evidence, other than mere speculation, that the Respondent connected Ditzler to these
charges or to any other Union activity at the facility. Additionally, as Ditzler was aware of the
DOT rules, he knew that the earliest that he could report for work on September 9 was 6:30
a.m., a half hour after the meeting began, or to make arrangements to attend a one-on-one
35 safety meeting, as other drivers had. Instead, he chose to do neither and went to the meeting at
6:15, an obvious violation by fifteen minutes and, to make matters worse, changed his log to
state that he attended the meeting at 9:00. As the evidence establishes that Ditzler could have
easily handled this situation by attending a one-on-one session, but instead made two errors in
the process, I find that Counsel for the General Counsel did not satisfy her initial burden under
40 *Wright Line* and I therefore recommend that this allegation be dismissed.

45 The final allegation in this category is that the Respondent discharged Ditzler as part of
its policy of more strictly enforcing the DOT rules, in violation of Section 8(a)(1)(3) of the Act. In
this situation, I find that Counsel for the General Counsel has satisfied her initial burden under
Wright Line. Stated briefly, What Ditzler was doing in late 2010 is what he, and other drivers,
had always been doing: falsifying his logs either at the request of, or with the acquiescence of,
Branyan. The only difference between the first part of the year and the period after July, is that
the Union won the election in August. Before that, they had never fired a driver at Eddystone for
falsifying his log; afterward, they fired Torres, Cajina and Ditzler within five months of the
50 election. That is not to say that drivers should be permitted to falsify their logs and to work hours
greater than those permitted by the DOT. Rather, it is to say that when a company has
historically permitted, even encouraged, such activity, they cannot punish its employees for
choosing to be represented by a union by pretextually punishing them for continuing to engage

in this activity. Also troubling in the Respondent's defense is its use of an alleged incident at the port to support its discharge of Ditzler. This alleged incident is totally unsupported by any direct credible evidence and, in fact, the Respondent chose not to contact the woman employed at the port who was, apparently, willing to support Ditzler's story. I therefore find that the Respondent has not satisfied its *Wright Line* burden, that Ditzler's termination on January 6 was pretextual, and therefore violated Section 8(a)(1)(3) of the Act.

Finally, it is alleged that the Respondent violated Section 8(a)(1)(5) of the Act by not complying with the Union's request of November 18 by providing the Union with sales figures for the prior twenty four months to support the Respondent's claim that there was a drop in business. This relates to the claim by Counsel for the General Counsel and counsel for the Charging Party that the drivers were being unlawfully deprived of a sixth day of work each week. All of the Respondent's drivers at Eddystone are represented by the Union and the products at the facility have to be delivered and the products at other locations, such as the port, have to be picked up. Somebody has to perform this work and if it is not the drivers at the facility, the only other choice is third party carriers or temporary drivers, and the Respondent provided the Union with the information regarding their use. Further, the Union's request for the financial information is based solely on its suspicion that the Respondent had more work at Eddystone than it was assigning to the unit driver. In *Bohemia, Inc.* 272 NLRB 1128, 1129 (1984), in similar circumstances, the Board stated:

In all the circumstances here, including the absence of any objective basis for believing unit work was being diverted, the absence of a pending grievance or arbitration concerning the matter as to which the information was requested, and the fact that such information has not been shown to have been relevant to the parties' negotiations, we conclude that the Union has failed to establish the relevance of the information requested.

I therefore find that the Respondent has provided the Union with adequate information, *albeit*, not in the form that the Union requested, and I recommend that this allegation be dismissed.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. At all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Robert Branyan is a supervisor of the Respondent within the meaning of Section 2(11) of the Act.

4. The following employees of the Respondent at its Eddystone, Pennsylvania facility constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

At full time and regular part time truck drivers at the facility, but excluding all other employees, guards and supervisors as defined in the Act.

5. Since on about August 17, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the unit.

6. The Respondent violated Section 8(a)(1) of the Act in the following manner:

- (a) Threatening its employees that it was futile for them to support the Union.
- (b) Threatening to discriminate against its employees because of their Union activities.
- (c) Creating the impression that the employees' Union activities were under surveillance.
- (d) Threatening employees with violence in retaliation for their Union activities.

7. The Respondent violated Section 8(a)(1)(3) of the Act in the following manner:

- (a) Reducing Torres' work days from six to five for the weeks ending July 30 and August 6.
- (b) Terminating the employment of Torres on about August 13, and Cajina and Ditzler on about January 6, 2011.
- (c) More strictly enforcing the DOT rules regarding driving and working hours.

8. The Respondent violated Section 8(a)(1)(4) of the Act by reducing the work days and work hours of West and Ditzler.

9. The Respondent violated Section 8(a)(1)(5) of the Act by more strictly enforcing the DOT rules regarding driving and working hours, without first bargaining with the Union about the subject.

10. The Respondent did not violate Sections 8(a)(1)(3)(4)and(5) of the Act as further alleged in the Amended Consolidated Complaint.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to post a notice to its employees, to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In that regard, I recommend that the Respondent be ordered to offer immediate reinstatement to Torres, Cajina and Ditzler to their former positions of employment, or if those positions no longer exist, to substantially equivalent positions, and to make them whole for all losses of earnings and other benefits as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), along with interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I also recommend that Respondent be ordered to rescind the unilateral changes that it made in about August 2010 regarding the working days and hours of its drivers, and to negotiate with the Union about that subject.

Upon the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommended

ORDER¹⁰

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.

Continued

The Respondent, Tricont Trucking Company, its officers, agents, successors and assigns, shall

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1. Cease and desist from
 - (a) Threatening its employees that it was futile for them to support the Union.
 - (b) Threatening to discriminate against its employees because of their Union activities.
 - (c) Creating the impression that the employees' Union activities were under surveillance.
 - (d) Threatening employees with violence in retaliation for their Union activities.
 - (e) Reducing employees work hours or work days in retaliation for their Union activities.
 - (f) Discharging, or otherwise discriminating against its employees because of their Union activities, or for giving testimony to, or cooperating with, the Board.
 - (g) Unilaterally enforcing DOT rules regarding work days and work hours, that are stricter than was previously enforced by the Respondent, without first bargaining with the Union about the subject.

(h) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Torres, Cajina and Ditzler reinstatement to their former positions, or if any of those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings, and other benefits, suffered as a result of the discrimination against them, in the manner set forth above in the remedy section of this Decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning the DOT rules regarding working hours and, if an understanding is reached, embody the understanding in a signed agreement.

5 (e) Within 14 days after service by the Region, post at its Eddystone, Pennsylvania facility, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 6, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

20 **IT IS FURTHER ORDERED** that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

25 **Dated, Washington, D.C., May 23, 2011**

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Joel P. Biblowitz
Administrative Law Judge

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¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten you that it is futile for you to support Teamsters Local Union No. 107, a/w International Brotherhood of Teamsters (“the Union”); **WE WILL NOT** threaten to discriminate against you because of your Union activities; **WE WILL NOT** create the impression that your Union activities are under surveillance; and **WE WILL NOT** threaten you with violence because of your Union activities.

WE WILL NOT discharge or otherwise discriminate against you because you engaged in Union, or otherwise protected activities, or gave testimony to, or cooperated with, the Board.

WE WILL NOT refuse to bargain with the Union about the DOT work hour rules.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Enrique Massa-Torres, Henry Cajina and Bill Ditzler immediate and full reinstatement to their former jobs, or if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and **WE WILL** make them whole for any loss of earnings and other benefits resulting from the discharges, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Torres, Cajina and Ditzler, and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL bargain with the Union concerning the DOT rules regarding working hours and, if an understanding is reached, embody the understanding in a signed agreement.

TRICONT TRUCKING COMPANY
(Employer)

Dated _____ By _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

615 Chestnut Street, One Independence Mall, 7th Floor

Philadelphia, Pennsylvania 19106-4404

Hours: 8:30 a.m. to 5 p.m.

215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.